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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. CARLOS ALVARADO, Defendant and Appellant.	F074014 (Super. Ct. No. VCF279129) **OPINION**

APPEAL from a judgment of the Superior Court of Tulare County. Kathryn T. Montejano, Judge.

Randy S. Kravis, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Michael P. Farrell, Assistant Attorney General, Louis M. Vasquez, Lewis A. Martinez and Amanda D. Cary, for Plaintiff and Respondent.

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Carlos Alvarado appeals from numerous convictions under Penal Code sections 288, subdivision (b)(1) and 288.7, subdivision (a), for sexually molesting his minor daughter, K.A.

Alvarado asks for independent review of the trial court's *Pitchess*[1] inquiry regarding specific personnel records of the police officer who investigated the instant matter. We detect no *Pitchess* error. He also argues the trial court prejudicially erred in excluding evidence of a misdemeanor vandalism conviction suffered by this police officer. We reject this contention.

Alvarado also contends the trial court improperly permitted the prosecutor to amend counts 7, 8, and 9 of the operative information. We agree and reverse his convictions on these counts.

Alvarado further argues that defense counsel provided ineffective assistance at trial, in failing to move, pursuant to Penal Code section 995,[2] to set aside three counts included in the commitment order, and further, failing to demur to these counts when they were subsequently alleged in the information (as counts 1, 2, and 3). We agree with Alvarado on this point as well, and reverse his convictions on counts 1, 2, and 3.

In addition, at the request of both parties, we strike a restitution fine erroneously imposed by the trial court under section 294, subdivision (b).

FACTS AND PROCEDURAL HISTORY

I. The Complaint

Alvarado was charged in this matter with sexually molesting his daughter, K.A., who was born on August 30, 1999.[3]

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1 *Pitchess v. Superior Court* (1974) 11 Cal.3d 531.

2 Subsequent statutory references are to the Penal Code, unless otherwise specified.

3 K.A.'s date of birth is relevant for resolution of Alvarado's claims on appeal.

On February 14, 2013, the Tulare County District Attorney filed a criminal complaint against Alvarado. The complaint included 11 counts of forcible lewd acts upon a child, committed between August 30, 2004 and August 29, 2007, in violation of section 288, subdivision (b)(1). (Counts 1-11.) As to counts 1, 2, and 3, the respective acts at issue were described as "penis to vagina, first time," "penis to vagina, next time," and "penis to vagina, last time," and, in connection with these counts, the complaint alleged that defendant "had substantial sexual conduct" with K.A., within the meaning of section 1203.066, subdivision (a)(8). As to counts 4, 5, 6, 7, 8, 9, 10, and 11, the acts at issue were described, respectively, as "tongue to breasts," "tongue in mouth," "penis to mouth," "penis to anus, first time," "penis to anus, next time," "penis to hand," "mouth to vagina," and "penis to vagina in vehicle." Counts 6 to 11 included an allegation that the defendant "had substantial sexual conduct" with K.A., within the meaning of section 1203.066, subdivision (a)(8). Counts 4 and 5 did not carry an allegation of substantial sexual conduct under section 1203.066, subdivision (a)(8).

The complaint further charged Alvarado with three counts of sexual intercourse with a child under 10, in violation of section 288.7, subdivision (a) (which criminalizes both sexual intercourse and sodomy), i.e., counts 12, 13, and 14. The acts at issue in these counts were described, respectively, as "sexual intercourse, first time," "sexual intercourse, next time," and "sexual intercourse, last time." Since the effective date of section 288.7 was September 20, 2006, the complaint alleged that the sexual intercourse at issue in counts 12, 13, and 14, occurred "between September 20, 2006 and August 29, 2007," when K.A. would have been seven years old. (§ 288.7.)

II. The Preliminary Hearing

Officers Marcos Nunez and Jorge Quintero testified for the People at the preliminary hearing held on December 16, 2013.

A. Officer Marco Nunez

Officer Marco Nunez testified that he spoke with K.A. on May 24, 2010. K.A. told him of *two incidents* in which the defendant, her father, sexually touched her. Specifically, K.A. said that the defendant "touched his penis in her butt" during these two incidents. K.A. told Nunez that the defendant subsequently "threatened to kill her and her mother if she were to say anything about the incidents." K.A. said that "she feared for her life as well as for her mother's" but was reporting the incidents because "her father had moved out of [their] residence." K.A. told Nunez that she was "either six or seven" years old when these incidents occurred. Regarding the first incident, she told Nunez that she had been playing video games with Martin [her older brother], when the defendant took her into the bathroom and committed the abusive act. Nunez testified that he was not "aware of" any evidence corroborating K.A.'s claims. Nunez further testified that later that same afternoon, K.A. told him that "she had lied to [him]." She specifically said that her father had not engaged in any sexual misconduct with her. She said she had leveled false accusations because she was angry that her father had a girlfriend. Nunez testified that K.A. contacted him again in March 2012. This time, she said that the accusations she had initially made were in fact true.

B. Officer Jorge Quintero

Officer Jorge Quintero attended a "CART [Child Abuse Response Team] interview" with K.A. on June 15, 2012. Quintero testified: "During the CART interview, [K.A.] described that Mr. Alvarado had arrived home from work, and she was playing video games. Mr. Alvarado had called her into the restroom where she met him. And he, at this point in her words, raped her." Quintero testified that K.A. stated that she was "five years of age" at the time. Quintero further testified: "She indicated that Mr. Alvarado asked her to sit on the sink. At which point, she described details such as he began kissing her on the mouth, inserting his tongue in her mouth, groping her or kissing her, her breasts, and at which point, inserting his penis in her vagina." K.A. "described

that her legs were open." "She described that she saw or noticed a white slimy substance that she compared to – similar looking to saliva on his penis" and "she also indicated that she had noticed it inside her vagina as well." K.A. indicated that the defendant would put his penis inside her vagina "almost every day" from the time that she was five years old to when she was six years old. In sum, these acts occurred when "she was five years of age" and "stopped when she was approximately six years of age." K.A. said that Martin, her older brother, was not present in the home when the abuse took place.

Quintero testified that besides the incident in the bathroom, K.A. described two other incidents. One occurred in the defendant's bedroom and the other in "[his] vehicle." Regarding the incident in the bedroom, she "described that she was asleep" and "when she woke, Mr. Alvarado was laying on top of her between her legs with his penis inserted in her vagina." Regarding the other incident, K.A. said that she was heading to a Kmart with Alvarado, when he "stopped the vehicle in an alleyway and asked her to get on top of him"; she did so after he grabbed her by the hair and arm. Alvarado then told her to "remove her jeans" and "began kissing her on the mouth" and "inserted his penis in her vagina." K.A. also described incidents in which Alvarado "licked her vagina," she put her mouth on his penis, and she touched his penis with her hand. Alvarado would threaten to kill K.A. and her family were she to tell anyone about the abuse.

Quintero testified that during the CART interview, K.A. explained that she had recanted her earlier accusations against her father, in 2010, because "Mr. Alvarado had asked her to drop [those] charges," threatening to "kill her and her family" if she did not do so.

As part of the investigation into K.A.'s allegations in 2012, Quintero spoke to K.A.'s mother. K.A.'s mother denied ever seeing any physical evidence to suggest that K.A. was being sexually abused.

Quintero also testified that a report of alleged abuse of K.A. by Alvarado was also made in July 2007. However, when K.A. was contacted by the authorities at that time, she denied that Alvarado had ever sexually touched her.

C. Magistrate's Ruling

At the end of the preliminary hearing, the magistrate concluded: "This is going to be an extremely difficult case if the only evidence is KA. But for purposes of the preliminary hearing, I am going to hold the defendant to answer for all counts: A [section] 288[, subdivision] (b)(1) [offense] as charged in Count 1, Count 2, in Count 3, in Count 4, in Count 5, Count 6, Count 7, Count 8, Count 9, Count 10, Count 11, and a [section] 288.7[, subdivision] (a) [offense] as charged in Count[s] 12 and 13 and 14. In addition, in Counts 1 through 11, the [section] 1203.066[, subdivision] (a)(8) [enhancement allegation] has been shown also." (There was no § 1203.066, subd. (a)(8) allegation attached to counts 4 and 5, however.)

III. The Information

The subsequent information charged Alvarado with 15 counts, rather than the 14 counts alleged in the complaint. The order of the counts in the information was different from the order reflected in the complaint. In the information, counts 1, 2, and 3 charged violations of section 288.7, subdivision (a), which criminalizes "sexual intercourse or sodomy." The acts at issue in counts 1, 2, and 3 were described, respectively, as "sexual intercourse, first time," "sexual intercourse, next time," and "sexual intercourse, last time." Although the effective date of section 288.7 was September 20, 2006, counts 1, 2, and 3 specified that the acts at issue occurred "[o]n or about and between August 30, 2004 and August 29, 2007."

Counts 4 through 15 charged violations of section 288, subdivision (b)(1), i.e., "forcible lewd act[s] upon [a] child," that occurred "[o]n or about and between August 30, 2004 and August 29, 2007."

The acts at issue in counts 4, 5, and 6 were "penis to vagina, first time," "penis to vagina, next time," and "penis to vagina, last time," respectively. An allegation of substantial sexual conduct under section 1203.066, subdivision (a)(8), was attached to counts 4, 5, and 6.

The acts at issue in counts 7 and 8 were "penis to anus, first time" and "penis to anus, last time," respectively. An allegation of substantial sexual conduct under section 1203.066, subdivision (a)(8), was attached to counts 7 and 8.

The act at issue in count 9 was "penis to vagina in vehicle." An allegation of substantial sexual conduct under section 1203.066, subdivision (a)(8), was attached to count 9.

The act at issue in count 10 was "penis to mouth." An allegation of substantial sexual conduct under section 1203.066, subdivision (a)(8), was attached to count 10.

The acts at issue in counts 11 and 12 were "mouth to vagina, first time" and "mouth to vagina, last time," respectively. An allegation of substantial sexual conduct under section 1203.066, subdivision (a)(8), was attached to counts 11 and 12.

The act at issue in count 13 was "penis to hand." An allegation of substantial sexual conduct under section 1203.066, subdivision (a)(8), was attached to count 13.

The acts at issue in counts 14 and 15 were "mouth to breasts" and "tongue in mouth," respectively.

IV. People's Trial Evidence

The People called as trial witnesses K.A., her mother (Rosa S.), her younger brother (Brandon), and Officer Jorge Quintero.[4]

A. K.A.'s Testimony

K.A., born on August 30, 1999, was 16 years old and in 11th grade at the time of trial, which commenced on May 9, 2016. Alvarado was her father. K.A. lived in Dinuba

[4] The People also called two other witnesses who testified to ministerial tasks performed for law enforcement, in connection with this case.

with her parents, two brothers (Martin and Brandon), and two younger sisters until she was about 11 or 12 years old, when her father moved out.

K.A. described the first time Alvarado sexually abused her. K.A. and Brandon were home with Alvarado. K.A. and Brandon were playing video games. Alvarado called K.A. into the restroom. He told her to get on top of the sink and take off her shorts and then started touching her chest and her vagina with his hand. Alvarado took his pants off and "put his penis in [her] vagina." K.A. testified that "this [was] the first time he raped [her]." K.A. further testified she was seven years old when this initial incident of abuse occurred. After the prosecutor reminded K.A. of her statement to the police in 2012, K.A. testified that this first incident of abuse actually occurred when she was five years old.

K.A. testified that from that point on, Alvarado put his penis in her vagina countless times, regularly and every other day, either in the bathroom (on top of the sink or toilet) or in her parents' bedroom. When the prosecutor asked if he did this more than 50 times, K.A. responded: "More, probably even more than that." The last time he did this, she was seven or eight years old. More specifically, Alvarado had sex with her at least three times when she was seven and more than three times when she was eight; however, he had sex with her more often when she was five and six. By the time K.A. was nine, her family had moved to a new house; no abuse occurred at the new house or thereafter.

K.A. provided other details about the abuse that had occurred. She had seen, at various times, clear "slime" come out of Alvarado's penis. K.A. also said that it "hurt really bad" when Alvarado put his penis in her vagina and afterwards, when she would pee, she felt a burning sensation in her vagina. She also found yellow and brown stains on her underwear, which she hid behind the tub. At one point, her mother found the hidden underwear and "threw them all away." Once, after putting his penis in K.A.'s vagina, Alvarado also kissed her vagina. In total, he put his mouth on her vagina three

times. Alvarado would also kiss K.A.'s "mouth … and … boobs." He would "French kiss" her. K.A. had also touched Alvarado's penis "four to six times" in the bathroom. K.A. also put her mouth on Alvarado's penis once, at his command.

K.A. testified that on one occasion, when K.A. was headed to the store with Alvarado, he pulled over and made her sit on his lap. K.A. said that Alvarado touched and kissed her but did not put his penis in her vagina. As to the latter point, K.A.'s testimony differed from the evidence presented at the preliminary hearing, at which Officer Quintero testified that K.A. told the police that Alvarado had "inserted his penis in her vagina" during the incident in the car. The prosecutor reminded K.A. of her earlier statement to Officer Quintero: "And do you remember telling the police that you think your dad put his private – his penis inside your vagina in the car that night?" K.A. did not "really recall – or remember about that."

The prosecutor asked K.A.: "And now, was there ever a time where your dad put his penis in your butt?" K.A. responded: "No." The prosecutor then asked: "Okay. Do you remember talking to an Officer Nunez from Dinuba Police Department?" K.A. responded, "Yes." The prosecutor continued: "And do you remember telling him that your dad put his penis in your butt two times?" K.A. responded in the negative. The prosecutor persisted: "Do you remember telling him that it really hurt when he put his penis in your butt two times?" K.A. again said, "No." The prosecutor asked, "Do you remember telling him that you cried when he put his penis in your butt two times?" K.A. responded: "No." The prosecutor asked: "Okay. And do you remember that happening?" K.A. responded: "No." This exchange referred to K.A.'s May 2010 report of abuse to Officer Nunez.

K.A.'s mother was usually away from home when Alvarado perpetrated the abuse. On one occasion her mother was there, but she did not notice that Alvarado took K.A. into the bathroom and put his penis in her vagina. Brandon was always home, playing video games, during the incidents of abuse. For about a year while the abuse was

happening, K.A.'s grandfather lived with the family as well. K.A. testified: "[Alvarado would] say if I would say anything to anybody, no matter who it was, that he'd kill me and my family." K.A. had seen Alvarado being violent with her mother and Martin, her older brother. K.A. further explained: "[Alvarado would] always like find a way to threaten me towards … being undocumented. He'd always say okay, if I go to jail and you tell them that I – that I raped you, then you're gonna go along with me, too, because we're both undocumented." Plus, her father helped with the bills and K.A. was concerned about harming her family's livelihood.

The prosecutor then asked K.A. about her initial contact with the authorities, in 2007, when she was eight years old. K.A. responded: "They came to my house. They knocked on my door, and they told me that they wanted to talk to me alone, and they talked to me and they were asking me questions saying that somebody reported that my dad was doing things to me. [¶] I told them it wasn't true." K.A. said she may have said something to her aunt, who might have reported her allegations to the authorities. K.A. testified that she did not tell the authorities the truth when they came to her door, because she "was threatened by [her] dad." Eventually, in 2010, K.A.'s mother took her to the police.

Regarding her 2010 contact with the police, K.A. explained that she told her mother about the abuse that year (when she was 11 years old). K.A. decided to tell her mother in part because her father would physically abuse her older brother, Martin, hitting and kicking him. K.A. testified: "I was tired of it until my parents divorced." So, after K.A.'s father moved out of the house, K.A. told her mother about the sexual abuse she had suffered. When asked who lived at the family's residence in 2010, she testified: "It was just me, my brother, my mom, my two sisters and my little brother." After K.A. told her mother, her mother immediately took her to the police to report the abuse.

The next day, when K.A. was coming home from school, Alvarado caught up to her by a little park next to the school and "threatened" her. K.A. testified: "He said if I

wouldn't drop the charges, that he would – that I knew who he was and that he would send somebody to do something to us." As a result, K.A. went home and asked her mother to take her back to the police station. At the police station, K.A. told Officer Nunez, with regard to her report of sexual abuse, that she "had made everything up and that it wasn't true." K.A. made up a lie to explain why she would falsely accuse her father of abuse, telling the officer that she had reported her dad only because she was mad at him as she had seen him "with some other lady." K.A. testified she had not actually seen her dad with another woman. Rather, she made up that story to cover for the fact that her father had threatened her into retracting her report of abuse.

K.A. went back to the police a few years later. At the time, her father was in a new relationship; K.A. had "heard he had a girlfriend." She did not "care if he [had] a new girlfriend." K.A. said that this time she "told [the police] the truth." K.A. felt safe telling the truth because her father was not around the family anymore.

K.A. testified that she spoke to her father in a pretext phone call arranged by the police. Her father told her that the problems between him and K.A. were "all [her] mom's fault." K.A. testified: "He didn't really specifically say sorry. He just said that he didn't know what he was doing and that [he hoped] that I can one day apologize to him." K.A. concluded: "I think it's time that I can now put him in [jail] 'cause it just – it hurts really bad 'cause he's my own father, and he did something to me, blaming it on my mom. My mom's been through so much, and he needs to pay for what he did to me, and I think it's an opportunity now that he could go and pay [for] what he did to me."

B. Rosa S.'s Testimony

Rosa S., K.A.'s mother, testified that she was cleaning her house one day, when she found K.A.'s stained underwear under the tub. When she showed the underwear to K.A., K.A. told her that her father would abuse her on top of the sink. Rosa confronted Alvarado and a big argument ensued. Alvarado threw away the underwear. He also had K.A. take a pregnancy test.

Rosa kicked Alvarado out of the house; he eventually moved to Washington State. Three or four months after kicking him out of the house, Rosa took K.A. to the police station to report the abuse. (Earlier in her testimony, Rosa said she took K.A. to the police station while Alvarado was still at home but did not tell him where they were going.) Rosa told Officer Nunez about the stained underwear that had been thrown away.

The day after K.A. reported the abuse to the police, she came back from school and was traumatized. She asked to go back to the police station, where she "lifted the report."

Rosa testified that Alvarado was physically abusive with her. Once he had stripped her clothes off and raped her in front of Martin, their oldest son. Rosa also recalled that often, when she would return home at night after work, K.A. would be freshly bathed; her eyes would be red and she would have "hickeys" on her arms.

In 2012, Rosa again took K.A. to the police. The police could not arrest Alvarado because he was in Washington State, for the most part. In 2013, Rosa saw Alvarado in Dinuba and alerted the police of his presence. Rosa did not know whether Alvarado had begun a new relationship, and in any event, she would not care. Rosa had not kicked Alvarado out of the house because he had been cheating on her. Rosa would not harm her family's reputation by asking K.A. to lie about the abuse.

C. Brandon's Testimony

K.A.'s younger brother, Brandon, testified that K.A. was three years older than him. He said that when he was two or three years old, he saw his father "rape" K.A., who was five or six at the time. Upon further questioning, Brandon clarified that K.A. and Alvarado would be in the bathroom with the door closed, so he did not actually see Alvarado put his penis in K.A.'s vagina. However, he said, "It's true that he did rape her."

Brandon would see K.A. come out of the bathroom, crying, with her pants off. Alvarado would be in boxers. Brandon testified: "It happened like more than 10 times,

I'm sure." Brandon had also seen Alvarado engage in physical altercations with K.A. and Rosa.

D. Testimony of Officer Jorge Quintero

After Alvarado was arrested in the instant matter, Officer Jorge Quintero interrogated him at the Dinuba Police Department. During the interrogation, Quintero suggested Alvarado talk to K.A. on the phone. Quintero then arranged for K.A. to call Alvarado on his cell phone and recorded the call. During the call, Alvarado, speaking in general terms, repeatedly apologized for hurting K.A. when she was younger. Without specifying what he had done, Alvarado explained he had acted because Rosa had told him that K.A. was not his daughter. Alvarado did not specify that he had hurt K.A. physically. Quintero did not know whether Alvarado was apologizing simply for hurting K.A.'s feelings.

Quintero also described Alvarado's responses to questioning during the interrogation. Quintero testified that Alvarado did not deny the molestation accusations outright but said "he was being accused by the mother" and that his interactions with his daughter did not happen "the way [Rosa] had decided." Alvarado pointed out that the accusations were made after he was seen with his new girlfriend. Quintero acknowledged that he was aware that K.A. had made the accusations after seeing Alvarado with his girlfriend. When Quintero employed an investigative ruse, telling Alvarado that police could recover his DNA from K.A.'s vagina even after all these years, Alvarado readily provided a DNA sample.

However, later in the interrogation, Alvarado described three incidents involving K.A. He described an initial incident when he aggressively cleaned K.A.'s vagina with his hand while she was in the shower. He said that another incident took place in the bedroom; as to this incident all he said was that it was similar to the first incident. Finally, he described a third incident in which his penis touched the outside of K.A.'s vagina. Later, Alvarado said that the first incident had involved his penis touching the

outside of K.A.'s vagina while she was on the sink in the bathroom and that the two subsequent incidents were like the first one in that there was no penetration. Alvarado said he was not aroused by these acts, which he did to retaliate against Rosa for telling him that K.A. was not his biological daughter. Alvarado consistently denied that he penetrated K.A. or forced himself on her.

Alvarado expressed a desire to apologize to K.A., so Quintero provided him with materials to write a letter to her. Alvarado wrote out a letter. The letter did not contain any admissions. "[Alvarado] was calm [during the interrogation] and had a reason for why the things … happened." Alvarado did not express outrage at the accusations.

The prosecutor admitted recordings of Alvarado's interrogation and the pretext phone call into evidence, but did not play them for the jury. The recordings were in Spanish. The prosecutor also admitted into evidence English language transcriptions of the recorded interrogation and pretext phone call.

V. Defense Evidence at Trial

The defense called K.A.'s older brother (Martin) as a trial witness. Alvarado also testified on his own behalf.

A. Martin's Testimony

Martin, K.A.'s older brother, was 22 years old at the time of trial in 2016. When he was younger, he was required to be home when his father got back from work. Although Martin remembered that his father would bathe his younger siblings at the end of the day, he had no recollection of K.A. going into the bathroom with Alvarado and screaming. If he had heard anything like that, Martin would have intervened. In fact, Martin never saw any inappropriate contact between Alvarado and K.A., nor did he see K.A. act in a way that would suggest she was afraid of Alvarado.

When authorities investigated a report of abuse against Alvarado in 2007, Martin told them he had not seen any inappropriate conduct on Alvarado's part because that was the truth. However, Martin acknowledged that he was a teenager during the relevant

period and would often be out with his friends. Martin started using marijuana at the age of 17.

Martin testified that he would see his parents argue and even come to physical blows. The physical altercations would be initiated by Martin's mother, who was an alcoholic and would become gripped by jealousy. In 2012, Martin saw his mother slap his father and his father respond by throwing her to the ground. However, he never saw his father rip off his mother's clothes or force himself on her. Martin's mother would accuse his father of touching K.A. inappropriately.

After Martin's parents separated, his father continued to visit the children regularly. For example, he would take the children out to eat or to the park and would play video games with them. K.A. would participate in these visits but would not show affection for Alvarado. For a time, Alvarado lived near Martin's mother and, on weekends, she would invite Alvarado to her home. In 2010, Alvarado went to Mexico for a time because his mother was ill.

B. Alvarado's Testimony

Alvarado's testimony was rambling and confusing. He testified that in 2007, he was interviewed by authorities investigating an abuse allegation but there had been no misconduct. In 2010, Alvarado and Rosa shared their house with a mother and daughter who were not related to Alvarado and Rosa. One night, after a party, Rosa became jealous and asked Alvarado whether he was leaving with the young girl who lived at the house. With regard to Rosa, Alvarado said, "Every time she drinks she gets like that." An argument ensued, with Rosa trying to slap Alvarado. Alvarado left and stayed over at his father's house. Rosa showed up over there and "made a scene." Rosa wanted Alvarado to return home but Alvarado refused because "things weren't okay." A little while later, Alvarado went to Mexico for five weeks to assist his mother who was ill and "needed an operation on her breast."

While Alvarado was in Mexico, Rosa took K.A. to the police. Rosa later told Alvarado she had taken K.A. to the police. However, K.A. told Alvarado that what she told the police wasn't true; "she said that she had said it because she thought that [Alvarado] was with the [other] young girl." Rosa also apologized; Rosa had thought that Alvarado was with that young girl while he was in Mexico. Alvarado testified: "My ex-wife told me that she had done that because she was mad at me for – because she thought I was with [the young girl]." Rosa never showed Alvarado any soiled underwear. Nor did Alvarado threaten Rosa or his children. As for K.A., Alvarado said: "Her mom always had her; how could I explain it? She never let me be close to her."

Also, in 2010, Alvarado had moved a block away but continued to regularly visit the children at Rosa's house. Alvarado was working in California for half the year and Washington for half the year at that time. In 2012, Rosa told Alvarado that she had again made a report against him and that the police were looking for him. Alvarado nonetheless returned to California as he was in Washington only for work and was "not trying to hide."

Alvarado said he did not commit any sexual acts with K.A. in the bathroom or bedroom. As for his interrogation, Alvarado said it was Officer Quintero who would mention specific incidents and provide details such as K.A. being on the sink and in the bedroom. Alvarado denied telling Quintero that he had aggressively rubbed K.A.'s vagina while bathing her. He explained: "All I did was show [K.A.] how one should clean themselves or bathe themselves, not that I did that." Alvarado said that his statements were attributable to pressure from Quintero's insistent and aggressive questioning, specifically the fact that "[Quintero] kept on saying you did it, you did it, you did it." Alvarado noted: "He would ask me the questions as if they were true, and then he would want me to answer." "[H]e kept on insisting the sink and the bed, the sink and the bed … [¶] … that's what was on the report supposedly."

When the prosecutor asked Alvarado specific statements he allegedly made during his police interrogation, Alvarado said, "It's been a long time, and I don't remember exactly [what I said]." Alvarado added that Quintero basically "kept on telling me it was this time, this time and this time." Regarding his plea for forgiveness to K.A. in the pretext phone call and the letter he wrote to her at the police station, Alvarado said: "From what I remember is that I was asking for forgiveness in general." Alvarado said: "[T]his was all because of how the mom wanted things to be painted as, like trying … [¶] … to get back at me because everything was based on the fact that she was angry at me … [¶] … and she would have my daughter talk like that." He added: "More than anything, it's the mom that had a hand in this. She's always manipulated my daughter, always." He also noted: "You need to know how my ex is so that you know how she is with our daughter." Alvarado said he did not get angry at K.A. over the phone for fabricating the allegations because he did not want to further traumatize her.

VI. Verdict and Sentence

The jury found Alvarado guilty of counts 1 through 10 and 13 through 15. The jury also found the substantial sexual conduct allegations attached to counts 4 through 10 to be true. On counts 11 ("mouth to vagina, first time") and 12 ("mouth to vagina, last time"), the jury found Alvarado guilty of assault, a lesser included offense. (§ 240.)

The court sentenced Alvarado to a determinate prison term of 80 years, consisting of separate terms of eight years (the upper term) on counts 4 through 10 and 13 through 15. The court also imposed an indeterminate term of 75 years to life, consisting of separate terms of 25 years to life on counts 1, 2, and 3, respectively. No time was imposed on counts 11 and 12.

DISCUSSION

I. Trial Court's Pitchess Inquiry

Before trial, Alvarado filed a *Pitchess* motion,[5] seeking discovery of various types of records related to "[citizen] complaints, civil claims, and/or lawsuits" concerning Officer Quintero's "lack of credibility, dishonesty, fabrication of charges, fabrication of evidence, falsification of any report, giving false testimony, or otherwise contending any lack of truth and veracity," including any psychological records and records of disciplinary actions related to such complaints, civil claims, and lawsuits. The trial court held an in camera hearing at which the City of Dinuba and the Dinuba Police Chief presented Officer Quintero's personnel files for the court's review (the records viewed by the court are included in the record on appeal). The court reviewed the files and concluded that the files did not contain any materials within the scope of counsel's *Pitchess* motion.

Alvarado asks us to independently review the sealed transcript of the in camera hearing, as well as the records produced at that hearing, to assess the propriety of the proceedings and the court's ultimate decision on discoverability of records. The People have no objection to Alvarado's request for independent review.

People v. Mooc (2001) 26 Cal.4th 1216, 1232 (*Mooc*) outlines the procedure for conducting a *Pitchess* inquiry. The custodian of records must produce "'all potentially relevant'" materials to the court, which then should make a record of what it reviewed:

> "Such a record will permit future appellate review. If the documents produced by the custodian are not voluminous, the court can photocopy them and place them in a confidential file. Alternatively, the court can prepare a list of the documents it considered, or simply state for the record what documents it examined. Without some record of the documents examined by the trial court, a party's ability to obtain appellate review of

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[5] *Pitchess v. Superior Court*, *supra*, 11 Cal.3d 531. The statutory scheme for such discovery is contained in Evidence Code sections 1043 through 1047 and Penal Code sections 832.5, 832.7, and 832.8.

the trial court's decision, whether to disclose or not to disclose, would be nonexistent." (*Mooc, supra,* 26 Cal.4th at p. 1229.)

A trial court's determinations pursuant to a *Pitchess* inquiry are reviewed for abuse of discretion. (*People v. Hughes* (2002) 27 Cal.4th 287, 330.)

We have independently reviewed the record of the trial court's *Pitchess* inquiry, including the transcript of the in camera hearing and the records submitted to the trial court. The trial court properly conducted the in camera hearing. Furthermore, we detect no abuse of discretion in the court's conclusion that Officer Quintero's personnel files did not contain any records that were relevant to counsel's *Pitchess* motion.

II. Officer Quintero's Conviction for Misdemeanor Vandalism

At the time of trial, Officer Quintero was no longer employed by the Dinuba Police Department. Officer Quintero had suffered a misdemeanor vandalism conviction under section 594. Alvarado argues the trial court erroneously excluded evidence of this conviction, thereby violating Alvarado's right to present a defense. We conclude Alvarado has forfeited any claim regarding Quintero's misdemeanor conviction by failing to obtain a final ruling on the admissibility thereof. Furthermore, even were we to assume the court erred, the error was not prejudicial under any standard of prejudice.

Prior to trial, the issue of the admissibility of Quintero's misdemeanor vandalism conviction was discussed in the trial court. Defense counsel argued: "I think that I should be allowed to question [Quintero] as to whether or not [he] pled to a moral turpitude crime." The following discussion then occurred:

> "THE COURT: So I don't believe vandalism as a misdemeanor is a moral turpitude crime, but I'll let the two of you – if you wish to brief me on that, you certainly can.
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> "[DEFENSE COUNSEL]: Yeah, I'm not too sure about that.
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> "THE COURT: [This issue and the previous one] *I'm not going to rule on, they're up in the air, if you will*, but you've certainly raised your objection.
>
> [¶] … [¶]

> "THE COURT: [I found] a resource you may object to, it's the quick reference charts from the Immigrant Legal Resource Center, and what were the charges that [Quintero] was –
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> "[DEFENSE COUNSEL]: 594.
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> "THE COURT: Thank you. It was a 594 as a misdemeanor?
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> "[THE PROSECUTOR]: Yes.
>
> "[DEFENSE COUNSEL]: Yes.
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> "THE COURT: The answer that they gave is divisible as – first of all, you need to understand the 594 that I have is not broken down. [¶] … [¶] [I]t does not appear as though it's a crime of moral turpitude. So that's a starting point that gives the two of you something to work with." (Italics added.)

In light of this record, we conclude defense counsel forfeited any error regarding Quintero's misdemeanor vandalism conviction because counsel failed to obtain a final ruling from the trial court on this issue.

In any event, even assuming for purposes of argument that the trial court erred in excluding evidence of this conviction, we conclude the error was not prejudicial under any standard of prejudice. (See, e.g., *People v. Campbell* (1994) 23 Cal.App.4th 1488, 1492-1493 [felony vandalism is a crime of moral turpitude]; *People v. Muniz* (2011) 198 Cal.App.4th 1324, 1331 (rev. granted Dec. 14, 2011, S196916; rev. dismissed Oct. 17, 2012, S196916) ["misdemeanor vandalism is a crime involving moral turpitude because it shares the element of maliciousness which *Campbell* held is the basis for concluding that felony vandalism involves moral turpitude"]; see also *People v. Duran* (2002) 97 Cal.App.4th 1448, 1460 [Evid. Code, § 452.5 created "a hearsay exception allowing admission of qualifying court records to prove not only the fact of conviction, but also that the offense reflected in the record occurred"].)

At trial, Quintero testified about Alvarado's interrogation and the pretext phone call between Alvarado and K.A. Alvarado argues that evidence of Quintero's misdemeanor conviction for vandalism would have cast doubt on Quintero's integrity as

an investigator, causing the jury to question the techniques he used to interrogate Alvarado. However, the interactions and statements that Quintero testified about were recorded and fully transcribed. Therefore, Quintero's recounting of Alvarado's interrogation and the pretext phone call, as well the nature of the interrogation techniques he utilized, could easily be evaluated with reference to the recordings and transcripts of the interrogation and pretext phone call, respectively. These recordings and transcripts were admitted into evidence (in fact, the prosecutor advised the jurors in closing argument to refer to the English transcriptions of the recorded interrogation and pretext phone call, both of which were conducted in Spanish). Given these circumstances, the outcome of the case primarily turned on the credibility of K.A.'s testimony relative to Alvarado's credibility, rather than on Quintero's credibility. Even if no recordings existed to back up Quintero's testimony and to reveal precisely how the interrogation progressed, a misdemeanor conviction for vandalism would reasonably have had only a limited impact on the issue of Quintero's credibility and integrity as an investigator (relative to, say, a felony conviction for a crime more directly reflective of dishonesty or abuse of authority). In sum, on the instant record, any error regarding exclusion of Quintero's misdemeanor conviction for vandalism was not prejudicial under any standard of prejudice.[6]

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6 Although we conclude that any error regarding exclusion of Quintero's misdemeanor conviction for vandalism was not prejudicial under any standard of prejudice, we reject Alvarado's argument that the *Chapman* standard of prejudice applies here because the exclusion of evidence of Quintero's misdemeanor vandalism conviction violated Alvarado's right to present a defense and, in turn, to due process. (*Chapman v. California* (1967) 386 U.S. 18, 24.) While "[t]he complete exclusion of defense evidence ... '"theoretically could rise to [the] level"' [citation] of a due process violation[,] ... short of a total preclusion of defendant's ability to present a mitigating case to the trier of fact, no due process violation occurs[,] even '"[i]f the trial court misstepped, '[and its] ruling was an error of law ... but [there was] only a rejection of some evidence concerning the defense.'"'" (*People v. Thornton* (2007) 41 Cal.4th 391, 452-453; see *People v. Hovarter* (2008) 44 Cal.4th 983, 1010 ["[t]he 'routine application of state evidentiary law does not implicate [a] defendant's constitutional rights'"]; *People v. Fudge* (1994) 7 Cal.4th 1075,

III. Amendment of Counts 7, 8, 9 (Violations of Section 288, subdivision (b)(1))

As stated above, counts 4 through 15 charged violations of section 288, subdivision (b)(1), i.e., "forcible lewd acts upon [a] child," that occurred "[o]n or about and between August 30, 2004 and August 29, 2007." The acts charged in counts 4, 5, and 6 were "penis to vagina, first time," "penis to vagina, next time," and "penis to vagina, last time," respectively. The acts charged in counts 7 and 8 were "penis to anus, first time" and "penis to anus, last time," respectively, and the act charged in count 9 was "penis to vagina in vehicle." The acts charged in counts 10, 11, 12, 13, 14, and 15 were "penis to mouth," "mouth to vagina, first time," "mouth to vagina, last time," "penis to hand," "mouth to breasts," and "tongue in mouth," respectively.

After the close of trial evidence, the prosecutor sought to amend counts 7, 8, and 9 because K.A.'s trial testimony was markedly different from the preliminary hearing evidence that these counts were based on. At the preliminary hearing, the prosecution presented only the testimony of Officers Nunez and Quintero. Counts 7 and 8 (penis to anus, first time and penis to anus, last time) were based on Nunez's testimony, while count 9 (penis to vagina in vehicle) was based on Quintero's testimony. Nunez testified that on May 24, 2010, K.A. told him that Alvarado had "touched his penis in her butt" on two occasions when she was "either six or seven." Nunez said K.A. told him she had been playing video games with her older brother, Martin, when her father took her into the bathroom and committed these acts. Nunez recounted that K.A. recanted the allegations later that same afternoon (i.e., the afternoon of May 24, 2010), telling Nunez she had lied about her father because she was angry with him for having a girlfriend. In March 2012, K.A. "flipped again" and reinstated the allegations (leading to the instant

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1102-1103 [same]; see also *People v. Ghebretensae* (2013) 222 Cal.App.4th 741, 750 [erroneous exclusion of impeachment evidence subject to *Watson* harmless error analysis]; *People v. Watson* (1956) 46 Cal.3d 818, 836.)

prosecution).[7] Quintero, for his part, described the statement obtained from K.A. at her June 15, 2012 CART interview, which was conducted in connection with the instant matter. Quintero testified that K.A. said that, when "*she was five years of age*," Alvarado "raped her" by "inserting his penis in her vagina," upon calling her into the bathroom when she was playing video games. (Italics added.) Quintero noted that, in addition to the bathroom incident, K.A. described "another incident that occurred in [a] vehicle," during which Alvarado "inserted his penis in her vagina." The prosecutor asked Quintero: "Did K.A. describe a timeframe as to when the defendant … would put his penis inside of her vagina?" Quintero answered, "Yeah. *She indicated that she was five years of age*. And it stopped when she was approximately six years of age." (Italics added.) The prosecutor further asked Quintero, whether K.A. had estimated how many times Alvarado put his penis in K.A.'s vagina "[d]uring the year of [time]" that "[K.A.] was five years to when she was six years old." Quintero responded: "She described that it was too many to count and that it occurred almost every day." Quintero added that on some days, Alvarado put his penis in K.A.'s vagina more than one time. Contradicting the evidence presented at the preliminary hearing, at trial K.A. specifically and steadfastly denied that Alvarado had ever touched her "butt" with his penis, despite repeated inquiries from the prosecutor in this regard. K.A. further testified, with regard to the incident in the vehicle, that Alvarado did *not* put his penis in her vagina on that occasion.

In light of K.A.'s trial testimony, the prosecutor sought to amend counts 7, 8, and 9 (originally, penis to anus, first time; penis to anus, last time; and penis to vagina in vehicle) to allege, respectively, "penis to vagina first time," "penis to vagina, next time," and "penis to vagina, last time and not in vehicle." The prosecutor sought this amendment notwithstanding the fact that counts 4, 5, and 6 already charged such acts,

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[7] Counsel asked Nunez whether K.A. "flipped again," and Nunez answered in the affirmative.

specifically, "penis to vagina, first time," "penis to vagina, next time," and "penis to vagina, last time," respectively.

The date range applicable to counts 4, 5, and 6, as well as to counts 7, 8, and 9, in the original information, was August 30, 2004 to August 29, 2007. However, along with the substantive amendments to counts 7, 8, and 9, the prosecutor further sought to change the date ranges for both sets of counts. For counts 4, 5, and 6, the prosecutor sought to change the applicable date range to August 30, 2004 through August 29, 2005 (i.e., K.A.'s fifth year). As for counts 7, 8, and 9, the prosecutor sought to change the date range to August 30, 2005 through August 29, 2006 (i.e., K.A.'s sixth year). Thus, the new date range for counts 7, 8, and 9, covered the year when K.A. was six years old (indeed, it encompassed the entirety of that year).

The court allowed the substantive amendments to counts 7, 8, and 9, and further allowed the amendment to the date range applicable to these counts (the court also allowed the amendment to the date range applicable to counts 4, 5, and 6). Alvarado argues the amendments to counts 7, 8, 9, were not supported by the preliminary hearing evidence and, therefore, the court's ruling constituted an abuse of discretion. We agree and reverse Alvarado's convictions on counts 7, 8, and 9.

Section 1009 authorizes the court to allow amendment of the information at any time, with the caveat that an information cannot be amended "so as to charge an offense not shown by the evidence taken at the preliminary examination." "Thus, it is the rule that 'a defendant may not be prosecuted for an offense not shown by the evidence at the preliminary hearing or arising out of the transaction upon which the commitment was based.'" (*People v. Graff* (2009) 170 Cal.App.4th 345, 360; *People v. Burnett* (1999) 71 Cal.App.4th 151, 178 ["prosecuting or convicting appellant of an offense different from and not transactionally related to the one shown by the evidence at the preliminary hearing" is clearly illegal]; *People v. Terry* (2005) 127 Cal.App.4th 750, 765-766 [same]; *People v. Thiecke* (1985) 167 Cal.App.3d 1015, 1017, fn. 1 [same].) A trial court's ruling

under section 1009 is reviewed for abuse of discretion. (*People v. Arevalo-Iraheta* (2011) 193 Cal.App.4th 1574, 1581; *People v. Miralrio* (2008) 167 Cal.App.4th 448, 458; *People v. Bolden* (1996) 44 Cal.App.4th 707, 716.)

In *People v. Jones* (1990) 51 Cal.3d 294 (*Jones*), our Supreme Court held that convictions for lewd acts under section 288 may properly be based on non-specific or "generic" testimony from the victim, i.e., "testimony describing a series of essentially indistinguishable acts of molestation." (*Jones, supra,* at pp. 299-300, 314.) *Jones* acknowledged that due process requires that "an accused be advised of the charges against him so that he has a reasonable opportunity to prepare and present his defense and not be taken by surprise by evidence offered at his trial." (*Id*. at p. 317.) *Jones* noted, however, that the answer to "[the question] as to how a defendant can prepare a defense against non-specific molestation charges 'is that, at a minimum, a defendant must be prepared to defend against all [section 288] offenses of the kind alleged in the information[,] as are shown by evidence at the preliminary hearing to have occurred within the timeframe pleaded in the information.'" (*Ibid*.)

As stated above, Alvarado argues that the court erred in permitting, after close of trial evidence, the amendments to counts 7, 8, and 9 because these amendments were "not supported by evidence adduced at the preliminary hearing." More specifically, Alvarado argues:

> "The prosecution amended [these] counts to allege three instances of sexual intercourse (or, as the Information referred to it, 'penis to vagina') occurring between August 30, 2005 through August 29, 2006, when [K.A.] was six years old. However, there was no evidence introduced at the preliminary hearing that [Alvarado] and [K.A.] engaged in sexual intercourse when she was six years old."[8]

Alvarado contends that the amendments to counts 7, 8, and 9 violated section 1009 and due process because they encompassed acts of sexual intercourse (or "penis to vagina")

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8 As stated above, K.A.'s date of birth is August 30, 1999.

committed when K.A. was six years old, while Quintero's testimony at the preliminary hearing established only that Alvarado had sexual intercourse with K.A. when she was five years old (as such acts stopped when K.A. turned six).

The People, on the other hand, contend that the amendments were proper in light of Quintero's testimony at the preliminary hearing that Alvarado had sexual intercourse numerous times with K.A. when she was five years old, which acts "stopped when she was approximately six years of age." The People, in their brief, suggest that Quintero's testimony reasonably indicated that acts of sexual intercourse frequently occurred when K.A. was five and continued for "at least *part of the time* that she was six years old." (Italics added.) However, the People do not clarify what part of K.A.'s sixth year was reasonably encompassed by Quintero's testimony. Moreover, the amended date range for counts 7, 8, and 9 (August 30, 2005 through August 29, 2006) basically *excludes* K.A.'s fifth year but covers the *entirety* of her sixth year (in contrast, counts 4, 5, and 6 charge penis-to-vagina acts that allegedly occurred in the course of K.A.'s fifth year). At oral argument, when pressed about the lack of clear parameters for the period at issue in counts 7, 8, and 9, counsel for the People changed course and took the new position that Quintero's testimony indicated that the penis-to-vagina acts occurred when K.A. was five and continued *throughout* her sixth year as well.

At the preliminary hearing, Quintero flatly testified that K.A. had said a penis-to-vagina act occurred in the bathroom when she was five years old. When asked about the timeframe for all the penis-to-vagina acts, Quintero similarly noted they occurred when "[K.A.] was five years of age." Quintero never testified that K.A. said these acts occurred when she was five years old *and* when she was six years old. On the contrary, he testified the acts "*stopped* when [K.A.] was approximately six years of age." (Italics added.) We conclude that Quintero's testimony, taken as a whole, reasonably indicated the acts occurred when K.A. was five years old and stopped when she *turned* six.

Accordingly, the trial court abused its discretion in approving amendments to counts 7, 8, and 9, whereby these counts collectively charged three separate penis-to-vagina acts when K.A. was six years old, i.e., from August 30, 2005 (K.A.'s sixth birthday) through August 29, 2006 (a day before K.A.'s seventh birthday). (See *People v. Pitts* (1990) 223 Cal.App.3d 606, 907-908 [unlike an information, the preliminary hearing transcript must show "the particulars," including "the time, place, and circumstances," of the crime charged]; see *Jones, supra*, 51 Cal.3d at p. 317 [preliminary hearing provides notice of the " 'timeframe'" of offenses alleged in the information].) In turn, we reverse Alvarado's convictions on counts 7, 8, and 9. (*Graff, supra*, 170 Cal.App.4th at p. 362 ["appellate courts are compelled to reverse convictions where substantial evidence was presented at trial that did not correspond to the charges established at the preliminary hearing"]; *Burnett, supra*, 71 Cal.App.4th at p. 177 ["It is as a matter of law irrelevant whether a defendant is prejudiced by being prosecuted for an offense not shown by the evidence at the preliminary hearing."].)

IV. Ineffective Assistance of Counsel in Relation to Counts 1, 2, and 3 (Violations of Section 288.7, subdivision (a))

The felony complaint initiating this matter charged Alvarado with three counts of sexual intercourse with a child under 10 in violation of section 288.7, subdivision (a). The date range provided for each of the three counts was September 20, 2006 through August 29, 2007. September 20, 2006 was the effective date of section 288.7, subdivision (a), therefore the complaint properly did not allege a violation of this section prior to the statute's effective date. On the statute's effective date, K.A. would have been seven years old as she turned seven on August 30, 2006.

After the preliminary hearing, the People filed the information. The order of the counts in the information was different from the order reflected in the complaint. The violations of section 288.7, subdivision (a) became counts 1, 2, and 3 in the information (they were counts 12, 13, and 14 in the complaint). The date range as to these offenses

also changed in the information. Specifically, unlike the complaint's date range of September 20, 2006 through August 29, 2007, the information alleged that these offenses occurred from August 30, 2004 through August 29, 2007.

The day that trial commenced, the prosecutor verbally moved to amend the date range alleged in the information for counts 1, 2, and 3, asserting the change was "not substantive." The following discussion ensued in court:

> "[THE PROSECUTOR]: Yes, Count 1, Count 2 and Count 3 should be between September 20th, 2006, and August 29th of 2007.
>
> "THE COURT: September 20th, did you say, of 2006?
>
> "[THE PROSECUTOR]: Yes.
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> "THE COURT: And August 29th of '07?
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> "[THE PROSECUTOR]: Yes, so just the intro date changes.
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> "THE COURT: Any objection, [defense counsel]?
>
> "[DEFENSE COUNSEL]: Just for the purpose of preserving my client's rights here, I am going to object to any last minute change made –
>
> "THE COURT: Is this consistent with the preliminary hearing?
>
> "[DEFENSE COUNSEL]: That's what I'm trying to remember.
>
> "[THE PROSECUTOR]: Yes, it is, your Honor. There was evidence at the preliminary hearing that this began at the age of five, and then there was evidence that continued to seven or eight years old.
>
> So she turns nine on August 30th of 2007; hence, the – the date range ending on August 29th, and the only reason I'm changing the intro date to September [20th], 2006, is that is when that statute went into effect. So although there is conduct that could have happened before that date, it would – could potentially violate ex post facto law if he was convicted on that charge because it didn't come into effect.
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> "THE COURT: So with that explanation, [defense counsel]?
>
> "[DEFENSE COUNSEL]: No objection.

> "THE COURT: Okay. So then the court will accept the oral request for amendment to Counts 1, 2 and 3 to change the dates that are presently set at August 30th of 2004 through August 29th, 2007, to change that to September 20th of '06 through August 29th of '07; correct?
>
> "[THE PROSECUTOR]: Yes."

Thereafter, at trial, K.A. testified that Alvarado had vaginal sexual intercourse with her from the time she was five years old until her ninth birthday. The jury convicted Alvarado of counts 1, 2, and 3.

Alvarado points out that, in contrast to K.A.'s trial testimony, the evidence at the preliminary hearing showed, at best, that the sexual intercourse underlying the section 288.7, subdivision (a) charges "ceased when [K.A.] turned six years old," thereby ending well before September 20, 2006, the effective date of section 288.7, subdivision (a), when K.A. would have been seven years old. Specifically, as noted above, at the preliminary hearing, Officer Quintero was asked about the time period when the acts of sexual intercourse alleged in the complaint took place. Quintero responded: "[K.A.] indicated she was five years of age. And it stopped when she was approximately six years of age." Unlike the prosecutor's misrepresentation to the trial court, on appeal the People concede there was no evidence at the preliminary hearing of acts of sexual intercourse when K.A. was seven years old, that is, after the effective date of section 288.7, subdivision (a). Specifically, the People posit: "The broadest reading of the preliminary hearing testimony only establishes that [Alvarado] had sexual intercourse with K.A. when she was five and six years old. This evidence does not support the section 288.7 charges [as the effective date of the statute was] September 20, 2006, when [K.A.] was already seven years old."

In light of the preliminary hearing evidence and the September 20, 2006 effective date of section 288.7, subdivision (a), Alvarado argues that counsel was ineffective on multiple grounds. Specifically, he argues counsel was ineffective for (1) failing to object to his commitment on the section 288.7, subdivision (a) charges at the preliminary

hearing and, subsequently, failing to challenge, pursuant to section 995, the inclusion of the section 288.7, subdivision (a) charges in the commitment order;[9] (2) failing to demur to these charges as they originally appeared in the information, on grounds of the ex post facto clauses of the federal and state Constitutions; (3) not objecting to the amendment of the date range for these charges on the first day of trial; and (4) failing to impeach K.A. at trial as to when the acts of sexual intercourse occurred. We agree with Alvarado that counsel was ineffective for failing to object to his commitment on the section 288.7, subdivision (a) charges, and, alternatively, for failing to demur to these charges as they originally appeared in the information, on grounds of the ex post facto clauses of the federal and state Constitutions.

To establish ineffective assistance of counsel, a defendant must demonstrate that (1) counsel's representation was deficient in falling below an objective standard of reasonableness under prevailing professional norms, and (2) counsel's deficient representation was prejudicial, in that there is a reasonable probability that, but for counsel's error, the result would have been different. (*Strickland v. Washington* (1984) 466 U.S. 668, 688, 694; *People v. Ledesma* (1987) 43 Cal.3d 171, 216, 217-218.)

As stated above, Alvarado argues that, since the complaint specified that the date range applicable to the section 288.7, subdivision (a) charges (counts 12, 13, 14) was September 20, 2006 through August 29, 2007 but the preliminary hearing evidence revealed that the underlying acts of sexual intercourse had stopped well before September 20, 2006 (the statute's effective date), defense counsel should either have made an appropriate objection at the preliminary hearing or subsequently challenged, pursuant to section 995, the inclusion of the section 288.7, subdivision (a) charges in the commitment order.

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9 Although defense counsel did file a section 995 motion, the motion sought dismissal of all counts alleged in the information on different grounds than those we are concerned with here.

Officer Quintero's testimony at the preliminary hearing established that K.A. had clarified in her June 2012 CART interview, which was conducted a year and a half before the December 2013 preliminary hearing and almost four years before trial, that the acts of sexual intercourse occurred when she was five years old and stopped when she turned six. Indeed, the People candidly concede that the evidence at the preliminary hearing "did not support the section 288.7 charges," which related to the time period when K.A. was seven years old. The People further acknowledge, correctly, that there was "no reason why trial counsel would have made a tactical decision not to object at the preliminary hearing or file a section 995 motion after the court issued a holding order on these charges." (See *People v. Stanfill* (1985) 170 Cal.App.3d 420, 422 [there is "no solid tactical reason for failing to bring a Penal Code section 995 motion, if the motion is supported by the facts"].)

On this record, we conclude that counsel was deficient for failing to challenge Alvarado's commitment on counts 12, 13, and 14 of the complaint. (See, e.g., *Hobbs v. Blackburn* (5th Cir. 1985) 752 F.2d 1079, 1083 [counsel must be familiar with facts of case and the law].) Defense counsel should properly either have made an objection at the preliminary hearing or subsequently challenged the commitment order pursuant to section 995, on grounds there was no showing of probable cause as to these counts at the preliminary hearing. Had counsel objected at the preliminary hearing, Alvarado would not have been committed on these counts. Similarly, had counsel subsequently challenged the commitment order pursuant to section 995, for a lack of probable cause as to counts 12, 13, and 14, the court would have been required to dismiss these counts. (See *Harris v. Superior Court* (2014) 225 Cal.App.4th 1129, 1146.) Alvarado therefore was also prejudiced by counsel's failures in these respects.[10]

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10 The People cite *People v. Crittenden* (1994) 9 Cal.4th 83, 137, for the proposition that Alvarado was not prejudiced by counsel's failures because any insufficiency of evidence at the preliminary hearing was cured by the presentation of substantial evidence at trial. However, *Crittenden* addressed the issue of the trial court's erroneous denial of a

Counsel was similarly ineffective for failing to demur, on grounds of the ex post facto clauses of the federal and state Constitutions, to the section 288.7, subdivision (a) counts, when the information was initially filed. The original information specified a different date range for these counts than the complaint—i.e., August 30, 2004 through August 29, 2007—that straddled the effective date of the statute. Since the penalty imposed by section 288.7, subdivision (a) (25 years to life for sexual intercourse or sodomy with a child under 10) greatly exceeds the penalties prescribed by section 288, the ex post facto clauses of the federal and state Constitutions preclude application of section 288.7, subdivision (a) to offenses committed prior to its effective date. (See *People v. Hiscox* (2006) 136 Cal.App.4th 253, 257 (*Hiscox*); *Collins v. Youngblood* (1990) 497 U.S. 37, 42 ["'any statute … which makes more burdensome the punishment for a crime, after its commission … is prohibited as *ex post facto*'"].)

Here, the date range originally specified in the information with respect to the section 288.7, subdivision (a) charges facially violated the ex post facto clause of the federal constitution, a point the People do not dispute. (See *Hiscox*, *supra*, 136 Cal.App.4th at p. 261 [conviction based on act involving timeframe that straddles effective date of criminal statute can stand only if "the evidence leaves no reasonable doubt that the underlying charges pertained to events occurring on or after" effective date of statute].) Accordingly, a demurrer would have been sustained as to counts 1, 2, and 3, for facial invalidity under the ex post facto clauses of the federal and state Constitutions. Nor could the People have saved the charges by amending the information to provide a

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section 995 motion and concluded that the question of the propriety of the commitment there was rendered moot in light of ample trial evidence supporting the jury's verdict. Unlike *Crittenden*, we must assess prejudice in the context of a claim of ineffective assistance of counsel, and hence the question is *whether there is a reasonable probability that, but for counsel's error, the result would have been different*. (*Strickland v. Washington*, *supra*, 466 U.S. at pp. 688, 694.) Since *Crittenden* did not address the question of prejudice in the context of an ineffective assistance of counsel claim, it does not control the outcome here.

date range beginning after September 30, 2006, because any amendment must be supported by the preliminary hearing evidence and here, since the preliminary hearing evidence did not support such an amendment, it would have been disallowed. (See, e.g., *People v. Zimmerman* (1980) 102 Cal.App.3d 647, 657 [attorney has duty to know and invoke the law].) In sum, counsel's failure to demur to counts 1, 2, and 3 when the information was first filed, constitutes deficient performance. In addition, Alvarado was prejudiced by counsel's failure to do so.

Alvarado's convictions on counts 1, 2, and 3 are reversed. Since we have reversed these convictions, we need not address Alvarado's challenges to these convictions on other grounds.[11]

V. Restitution Fine

Alvarado challenges a $1,000 restitution fine imposed by the court pursuant to section 294, subdivision (b), on grounds that he was not convicted of an offense enumerated in that statute. The People agree that section 294, subdivision (b) applies only to convictions under sections 261, 264.1, 285, 286, 288a, and 289, while Alvarado was convicted of violations of sections 288.7 and 288, subdivision (b)(1). The fine imposed pursuant to section 294, subdivision (b) is therefore stricken.

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11 Alvarado further argues that counsel was ineffective in failing to object to the prosecutor's mischaracterization of the preliminary hearing evidence to the court in seeking to amend the information on the first day of trial, to change the date range alleged therein *from* August 30, 2004 through August 29, 2007 *to* September 20, 2006 through August 29, 2007. The prosecutor incorrectly told the court that this amendment was supported by the preliminary hearing evidence (when it was not), whereupon the court allowed the amendment. In addition, Alvarado contends that counsel was ineffective for failing to impeach K.A.'s trial testimony regarding the time frame of the underlying acts of sexual intercourse with the statements she gave at her CART interview (as recounted by Officer Quintero at the preliminary hearing). Finally, Alvarado argues that counts 1, 2, and 3 must be reversed because of a prejudicial instructional error by the trial court.

DISPOSITION

Alvarado's convictions on counts 1, 2, 3, 7, 8, and 9 are reversed and the restitution fine imposed pursuant to section 294, subdivision (b) is stricken.[12] The matter is remanded for resentencing. The judgment is affirmed in all other respects.

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SMITH, J.

WE CONCUR:

_____
PEÑA, Acting P.J.

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DESANTOS, J.

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[12] Because this disposition is based on ineffective assistance of counsel, the clerk of this court is directed to give the required notice to the State Bar pursuant to Business and Professions Code section 6086.7 and to Alvarado's trial counsel pursuant to California Rules of Court, rule 10.1017, upon issuance of the remittitur. (See *In re Jones* (1996) 13 Cal.4th 552, 589, fn. 9; *In re Sixto* (1989) 48 Cal.3d 1247, 1265, fn. 3; *People v. Pangan* (2013) 213 Cal.App.4th 574, 584, fn. 10.)